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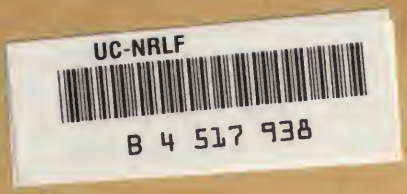

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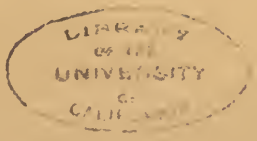
THE CONFISCATION OF PROPERTY DURING THE CIVIL WAR

A DISSERTATION
SUBMITTED TO THE FACULTY OF THE GRADUATE SCHOOL OF
ARTS AND LITERATURE

IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY
DEPARTMENT OF HISTORY

BY
JAMES GARFIELD RANDALL



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PREFACE

This monograph is intended to present the results and conclusions of an investigation of the federal policy of confiscation during the Civil War, undertaken as a doctoral dissertation for the Department of History in the University of Chicago. Though the nature of such a study is sufficiently clear without introductory comments, and though its importance may not justify an extended preface, yet a word of explanation may perhaps be in order as to the choice of subject matter and the method pursued in this short volume. The writer has, for the purpose of unity of treatment, excluded various topics which are plainly related to the subject of confiscation during the Civil War. The important, though undeveloped, subject of rebel sequestration, for instance, has been referred to only incidentally as throwing light on the motives for the Union measures of forfeiture. A unique class of "property", namely slaves, is excluded from consideration here, because the study of this topic constitutes a substantial problem in itself, and its connection with the policy of general confiscation was only incidental. Mere military seizures, pursued in accordance with the general army instructions from Washington, fall outside the scope of the present study, as do also forfeiture for violation of the non-intercourse acts, seizures for evasion of the internal revenue, and the capture and disposition of maritime prizes. These omissions have been necessary in order to preserve the minuteness of subject matter appropriate to monograph treatment.

The method of presentation pursued throughout the study is to classify the data regarding seizures under general heads according to the principal kinds of situations in which property might be placed, and to present the main problems or lines of policy which the government followed in taking, trying, and restoring property, rather than to explore the details of individual cases, though considerable material of this sort is in the writer's possession derived from the original court records. More space has intentionally been given to the constitutional and legal phases of the subject, than to economic and social considerations. The writer's justification for this emphasis is the highly important bearing of the confiscation question upon the larger constitutional problems of the

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Civil War, about which much remains still to be written. The study in its present form represents the results of frequent revisions, which doubtless give a tone of severe condensation, but it is hoped that, whatever graces of style may have been sacrificed, clearness has at least been maintained.

The sources used are indicated in the section on bibliography and in the footnotes. Besides published documents, statutes, debates, decisions, and records, the writer has had access to such unpublished material as the federal district court records, the files of the Attorney-General's office, and of the Treasury Department, and the captured records of the Confederacy. The author's chief acknowledgments are due to Professor C. H. Van Tyne, of the University of Michigan, with whose valuable help the work was begun as a seminary study, to Professor A. C. McLaughlin, of the University of Chicago, whose suggestions and comments on the first draft of the manuscript have been of the greatest assistance, and to the various officers at Washington to whom application was made for the privilege of examining the archives. Particular acknowledgment in this connection is due to the kindness of the officials of the Miscellaneous Division of the Treasury Department. It should be noted at this point that portions of the dissertation have been published in the American Historical Review, in the number for October, 1912.

JAMES G. RANDALL.

Salem, Virginia,
February 19, 1913.

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I. THE LEGISLATIVE POLICY OF CONFISCATION

The annals of the Civil War furnish many instances of the use of extreme methods in crippling an enemy. To those who approach the study of this period after an interval of a half century certain of the measures employed on both sides seem to be clearly outside the limits prescribed in civilized warfare, while other measures appear to occupy the borderland between what is forbidden and what is allowed. To the latter class belong the acts by which the Union government confiscated the private property of those who adhered to the Confederate cause. (The employment of a similar measure by one of the great nations today would be generally condemned, and grave doubts were raised at the time as to the justice of such a policy.)

Our concern in the succeeding pages will be to see how the confiscation policy developed after a long and trying Congressional struggle, to observe the extent of friction and annoyance caused by the enforcement of the acts, and to examine the problems of legal interpretation with which the judges of the period labored. Besides the Confiscation Acts proper we shall take into view various forfeitures in which, under other names and forms, essentially similar principles with reference to the treatment of property were applied. In the administration of the direct tax in the South, for instance, a form of forfeiture was adopted which amounted, virtually, to confiscation. The same was true of the collection of captured cotton by the treasury officials, and the administration of abandoned estates which fell into Union possession. These forms of seizure will claim our attention then, as representing *virtual* confiscation. Our inquiry extends also to the final disposition of the property, as well as its original forfeiture, and this involves a study of the various methods of restoration which were adopted after the war.

To trace the policy of confiscation to its origin would perhaps be impossible since it arose from widely scattered sources, but the earliest official suggestion looking to the forfeiture of "rebel" property seems to have been that of Secretary of the Treasury

Chase, who, in 1861,[1] before the matter came up in Congress, urged the financial advantages of confiscation. A formidable array of petitions received in Congress from loyal citizens in various parts of the North and even of the South during the year 1861-1862 indicates that the subject had attracted a lively attention throughout the country.[2] But a factor of far more influence was the action of the Confederate government in sequestering northern debts. A Confederate statute of May 21, 1861, forbade the payment of debts due to northern individuals or corporations, authorizing their payment into the Confederate treasury, and an act of August 30 provided for the sequestration of the property of "aliens", by which term was meant all those adhering to the Union cause.[3] In view of these acts it was urged in Congress that, aside from the general question of the justice of confiscation, a sweeping measure of forfeiture had practically been forced upon the Union government by the action of the enemy.

The first confiscation law, a measure of limited scope, applying only to property (including slaves) actually employed in the aid of insurrection, was introduced in the first session of the Thirty-Seventh Congress in the summer of 1861.[4] It was urged by such radical leadership as that of Thaddeus Stevens of Pennsylvania,[5] considered with as much deliberation as the crowded business of this short session would allow, and became a law on August 6. So far as the pure principle of confiscation was concerned, these debates were unimportant. The absorption of Congress in more pressing matters, and the introduction of the amendment regarding slaves prevented a full discussion of the constitutional and legal merits of the confiscation question. Indeed it was only in the House of Representatives, and there but briefly, that the real issue of confiscation was debated at all. We must look therefore to the next session of

[1] *Finance Report,* 1861, pp. 12-13.

[2] During the month from April 1 to May 1, 1862, the following petitions regarding confiscation were received in the House: from Citizens of Wisconsin (*House Journal,* 37 Cong., 2 sess., p. 494); Citizens of Marion County, Indiana, p. 499; Citizens of Ohio, p. 567; Citizens of Springfield, Ohio, p. 620; of Warren County, Ohio, p. 624; of Hamilton County, Ohio, p. 634; of Cincinnati, Ohio, p. 634. See also *Senate Journal,* 37 Cong., 2 sess., pp. 90-692, *passim.*

[3] *Statutes at Large, Provisional Government of the Confederate States of America,* p. 201.

[4] July 15, 1861. *Cong. Globe,* 37 Cong., 1 sess., p. 120. For the final statute see *Stat. at Large,* XII. 319.

[5] *Cong. Globe,* 37 Cong., 1 sess., p. 414.

the Thirty-Seventh Congress for a full treatment of the difficult points involved.

It requires laborious application to follow the second confiscation measure along its tortuous course through the long session of the Thirty-Seventh Congress. The subject was under frequent consideration during the whole of this session from December, 1861, to the following July. On the opening day, December 2, Senator Lyman Trumbull of Illinois, a radical Republican, gave notice of his intention to introduce "a bill for the confiscation of the property of rebels and giving freedom to the persons they hold in slavery";[6] on the 5th he presented his bill with brief arguments in its support;[7] later as chairman of the Committee on Judiciary he redrafted the measure,[8] and it was around this nucleus that legislative confiscation developed. According to Trumbull's bill, the property of all persons out of reach of ordinary process of law who were found in arms against the United States or giving aid or comfort to the rebellion, was to be forfeited, the seizures to be carried out by such officers, military or civil, as the President should designate for the purpose. There were no enumerated classes, the liability to forfeiture being based simply upon participation in the rebellion. The bill in this stage differed widely from the measure which was finally enacted, but the debates are none the less instructive, since most of those who spoke dealt with the general question rather than with details.

In both houses the supporters of confiscation were Republicans of the more northern states, while its opponents were men of the border states and northern Democrats. The advocates of confiscation joined in urging the necessity of a measure to punish the "rebels"; stress was laid on the importance of crippling the financial resources of the Confederacy, at the same time adding to those of the Union, and it was urged that in a struggle so gigantic the Union government should exercise the supreme power of self-defense. On constitutional and legal questions, however, there was no such harmony of opinion. To raise such points as the war power of Congress, the status of the "rebels", the legal character of the Civil War, the restrictions of the attainder clause of the Constitution, the belligerent rights as against the municipal power of Con-

[6] *Ibid.*, 2 sess., p. 1.
[7] *Ibid.*, p. 18.
[8] *Ibid.*, p. 942.

gress, was to reveal a deplorable confusion of logic, and a jarring of opinions even among those who voted together. United in their notion as to the practical result sought, the supporters of confiscation, it would seem, had as many different views regarding the constitutional justification of their measure as there were individual speakers. Among the opponents of confiscation, inconsistencies and contradictions were no less frequent. Some of the speakers regarded the measure as too extreme; others denounced its unconstitutionality; others spoke for a policy of clemency or argued the inexpediency of the project.

As the discussion proceeded the possibility of securing a plan upon which all could agree became fainter. While the question would not down, each time of its recurrence seemed to present new difficulties. Motions to substitute radically different measures for the bill in hand, motions to postpone, motions to refer, and motions to amend, were continually being pushed, but these only served to delay and prolong the deliberations, and many a formidable speech on the merits of the question was delivered when in reality the matter before the House was one of parliamentary routine. Finally, after months of intermittent debate, after the appointment in each house of a select committee,[9] the matter was adjusted by a conference committee of both houses,[10] and thus a measure was evolved which passed the two branches of Congress.

As finally passed, the second confiscation law bore the title, "An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes".[11] The first four sections, drawn from the Senate bill, relate to the crime of treason and rebellion and prescribe punishments. Sections 5 and 6 declare the forfeiture to the United States of the property of certain specified classes of "rebels". A distinction was made between two main groups. The property of all officers whether civil, military, or naval, of the Confederate government or of any of the "rebel" states, and of citizens of loyal states giving aid or comfort to the rebellion, was declared seizable at once without qualification. Other persons in any part of the United States who were

[9] *Cong. Globe*, 37 Cong., 2 sess., pp. 1846, 1991.

[10] *Ibid.*, p. 3166.

[11] *Stat. at Large*, XII. 589. The expression "other purposes" referred to those sections of the statute which provided for the forfeiture of slaves.

engaged in or aiding the rebellion were to be warned by public proclamation and given sixty days in which to return to their allegiance; if they failed to do so their property was to be confiscated. Proceedings against suspected property were to be instituted in the federal district or circuit courts, and the method of trial was to conform as nearly as might be to that of revenue or admiralty cases. If found to belong to a person who had engaged in rebellion, or who had given it aid or comfort, the goods were to be condemned "as enemy's property" and to become the property of the United States. The proceeds were to be paid into the treasury of the United States, and applied to the support of the armies. Three important sections, referring to slaves, do not concern us here. By section 13 the President was given power to pardon offenses named in the act.

An analysis of the vote on this measure shows that the division resulted from a complication of sectional with party interests. In the House of Representatives the count stood eighty-two to sixty-eight.[12] Of the supporters of the bill,[13] seventy-seven were Republicans representing constituencies north of the Ohio. All but three of the Democrats who voted opposed the bill. No such solidarity was to be found in the majority party, for twenty of the Republican or Unionist members answered "nay". Of the twenty-five border state men all but three voted with the opposition.[14] In the Senate the measure received twenty-seven affirmative and thirteen negative votes.[15] Eight of those voting in the negative were border state men, while only seven were thorough Democrats, showing again the large part which sectional sympathies played in determining the vote.

But the measure was not yet law. President Lincoln, who had never expressed more than a mild approval of confiscation, objected to several features of the congressional bill and prepared a rather elaborate veto message.[16] The measure, he said, would result in the

[12] *Cong. Globe,* 37 Cong., 2 sess., p. 2361.

[13] The three Democrats who favored the bill were: William G. Brown, from the loyal portion of Virginia, John Hickman, a Douglas Democrat from Pennsylvania, and John W. Noell, a Union Democrat of Missouri.

[14] Besides Brown and Noell the only border state man who favored confiscation was the intense Unionist and friend of Lincoln, Francis P. Blair of Missouri.

[15] *Cong. Globe,* 37 Cong., 2 sess., p. 3276.

[16] *Senate Journal,* 37 Cong., 2 sess., July 17, 1862, pp. 872-874; *National Intelligencer,* July 18, 1862.

divesting of the title to real estate forever. "For the causes of treason", he pointed out, "and for the ingredients of treason not amounting to the full crime", it declared forfeitures extending beyond the lives of the guilty parties. This feature of the bill the President regarded as a violation of the attainder clause of the Constitution. Further he argued that the act by proceedings *in rem* would forfeit property "without a conviction of the supposed criminal, or a personal hearing given him in any proceeding". When it was known in Congress that President Lincoln intended to veto the bill, a rather unusual proceeding was resorted to. A joint resolution was rushed through both houses which was intended as "explanatory" to the original measure.[17] In accordance with this resolution, the law was not to be construed as applying to acts done prior to its passage,[18] nor "as working a forfeiture of the real estate of the offender beyond his natural life". Although this left an important part of his objections untouched (*i. e.*, as to the condemnation of property without allowing a personal hearing to the supposed criminal), Lincoln approved the measure in its modified form, and on the last day of the session, July 17, 1862, he signed the act and the explanatory resolution "as substantially one".[19]

[17] *Stat. at Large,* XII. 627; *Cong. Globe,* 37 Cong., 2 sess., p. 3380.

[18] In Conrad *v.* Waples, 96 U. S. 279, it was decided that confiscation under the act of July 17, 1862, applied only to the property of persons who might thereafter be guilty of acts of treason and disloyalty. For judicial interpretation of the duration feature of the resolution, see Wallach *v.* Van Riswick, 92 U. S. 208; Bigelow *v.* Forrest, 9 Wallace 339; *infra,* pp. 24-28.

[19] *Senate Journal,* 37 Cong., 2 sess., July 17, 1862, pp. 871-872.

II. THE PROCESS AND EXTENT OF JUDICIAL CONFISCATION

These widely different measures of confiscation were put into operation side by side, and remained so during the war.[20] By the terms of each of the statutes, the forfeiture of property was made a strictly judicial process, enforced through the federal district courts under the direction of the Attorney-General and the district attorneys. Information concerning confiscable property might reach the federal officials through regular channels, as by the deposition of a United States commissioner; it might be supplied gratuitously by some citizen informer, or it might be secured by the interception of letters and despatches intended for Confederate owners. The application of the laws, it must be remembered, was limited to those districts where federal courts were in operation, and, since jurisdiction depended upon *situs*,[21] the property contemplated for seizure must be located in the north though owned by "rebels".

In beginning suit, a libel of information, analogous to that denounced against smuggled goods, would be filed with the district attorney; a monition or public advertisement would then be issued by the marshal summoning the owner to appear in court and establish his loyalty; then would follow, at its proper time on the docket, the suit itself, and in case of condemnation, the marshal would be directed to sell the property at public auction, turning the proceeds, after the payment of costs, into the public treasury.

The difficulties of enforcing these acts made the work exceedingly distracting to the officials. No distinct department of justice existed at that time[22] and the office of the Attorney-General, to whom legal questions were referred, was inadequate to the handling of any

[20] The existence of the two acts side by side produced not a little confusion. Prosecutions in a given case might be instituted under either act or under both, according to the circumstances. In the Wiley case (*Annual Cycl.*, 1863, p. 220) the libel was under the act of 1861, and the proof under that of 1862.

[21] A district court in New York, for instance, could not acquire jurisdiction over the stock of an Illinois corporation. U. S. *v.* 1756 Shares of Stock, 27 Fed. Cas. 337.

[22] The establishment of the department of justice did not take place until June 22, 1870. *Stat. at Large*, XVI. 162.

considerable amount of business.[23] Both the published reports and the manuscript records of the office indicate that its machinery was slow in starting, and it seems to have encountered considerable friction when it did start. Upon the difficult legal questions which arose in connection with the initiation of proceedings, there was considerable confusion of thought in the minds of the district attorneys, and little help in this matter was secured from the office of the Attorney-General who invariably "declined to advise the law officers of the government as to what constitutes a proper case for action under the law".[24] The local officers, thus left to their own responsibility, naturally hesitated to bring action, and this difficulty was augmented by the fact that no regular provision was made for defraying the preliminary expenses of preparing a suit in cases where the government might fail to secure conviction.

Taken all together, therefore, this seemingly smooth and workable method of seizure was seen to involve serious obstacles. The very correctness and completeness of the judicial process made it impracticable in a strenuous time when things had to be done quickly, and when a dilatory execution would seem to defeat the whole purpose of the law. It was natural under the circumstances for an impatient general or provost-marshal to take the law into his own hands and by his summary action become involved in disputes with the judiciary. These vigorous men regarded confiscation as a war measure, and proceeded to carry it out as such.[25] It was doubtless the purpose of Congress, however, to guard carefully the exercise of a power so formidable, and one which might be put to so great abuse.

In view of these distracting conditions the lax and irregular enforcement of the acts will not cause surprise. Though a considerable litigation was occasioned, the net results, after deducting

[23] The total monthly pay-roll at this period amounted to only $1,522.06, while the schedule of salaries showed only eight employees in the entire office, the Attorney-General, assistant attorney-general, chief clerk, four assistant clerks, and one messenger. (These data are revealed in the files of the Attorney-General's office, Washington, for September, 1864.)

[24] Acting Attorney-General T. J. Coffee to R. I. Milton, U. S. Commissioner, Albany, New York, September 2, 1861. (Letter-Book "B 4", Dept. of Justice, p. 147. A series of such letters of instruction was issued to district attorneys and marshals during the same month. The one cited is merely typical.)

[25] Instances of conflict between civil and military officers regarding confiscation were not uncommon. A dispute arose over a military seizure of property in Washington belonging to John A. Campbell, Confederate assistant secretary of war. *House Ex. Doc. 44*, 37 Cong., 3 sess. For General Lew Wallace's action in directing extensive military seizures in Maryland see *Official Record*, third series, IV. 407, 413, 431.

the heavy judicial costs,[26] and after allowing for cases dismissed, appealed, "settled without suit", or in which the judgment was entered for the claimant, were almost incredibly small.[27] In New York, $19,614; in Louisiana, $67,973; in West Virginia, $11,000; in Indiana, $5,737—these sums, so far as mere financial totals can tell the story, are representative of the extent of the confiscations. According to a report of the solicitor of the Treasury Department dated December 27, 1867, the total proceeds actually paid into the treasury up to that time amounted to the insignificant sum of $129,680.[28] In comparison with these figures, the confident predictions of the supporters of confiscation in Congress as to the material weakening of the enemy's resources sound strange indeed. This plausible justification, then, of a policy so extreme as that of general confiscation was based on an unfortunate miscalculation. Enough indeed was done to work individual hardship, and to add to the bitter feelings following the war, but the comparatively few transfers of property gave the Union government no material advantage at all sufficient to justify so questionable a war measure. Financially, it may be said, confiscation was a failure, while the other purpose of the act, that of punishing the "rebels", was very unequally accomplished.

[26] The cost attached to the filing and publication of the libel, and the fees charged by the district attorney, clerk, and marshal, always reduced by a large proportion the balance remaining to the United States. The following case presents a rather striking coincidence, the various items of expense forming a total which corresponds exactly to the amount of the proceeds. Files of U. S. District Court for Indiana, case no. 205, January 17, 1863.

Proceeds of sale (of "credits etc.")		$202.00
Marshal's costs	51.36	
Marshal's fees	63.27	
Docket fees	40.00	
Clerk's costs	44.12	
Clerk's fees	3.25	$202.00
Balance for United States treasury		0.—

[27] An examination of the docket books and files of the federal district court in Indiana reveals 83 cases of confiscation between September, 1862, and May, 1865. Of these, 44 resulted in forfeiture. The property seized was miscellaneous in character, including real estate, credits, cash, judgments in court, commercial stocks, government bonds, cotton, whiskey, a stallion, and a steam-engine. In the District of Columbia, from May, 1863, when condemnations began, to September, 1865, the number of cases docketed was 52, and the number of forfeitures 27. The totals given in the annual reports of the solicitor of the treasury are unsatisfactory, since he combines confiscation suits with forfeitures under non-intercourse regulations, and sometimes with prize cases. See *Finance Reports*, 1863, p. 90, 1864, p. 88.

[28] *Sen. Ex. Doc. 58*, 40 Cong., 2 sess. This report of the solicitor was based upon the financial returns which marshals were required to make to the Treasury Department. The total which it shows does not include the returns in the District of Columbia, amounting to $33,265, which were deposited in the registry of the court and later restored to the owners. It excludes also the proceeds of the Virginia confiscations, because of the fact that the clerk of the district court of that state was a defaulter to the extent of $91,579.29. The proceeds of the Kansas cases were not reckoned in for a similar reason. By the addition of such sums as these the net proceeds of confiscation will be seen to approximate $275,000. (Considerable unpublished material relating to the Virginia confiscations, comprising letters, receipts, depositions, and reports of investigating officers, may be found in the files of the Miscellaneous Division of the Treasury Department, marked "Cotton and Captured Property Record, 1370". Regarding the Kansas cases, see Osborn *v.* U. S., 91 U. S. 474.)

III. CONFISCATION AS A BELLIGERENT RIGHT

In the field of judicial interpretation the confiscation problem proved equally as troublesome as in Congressional debate or in its official enforcement. The relation of confiscation to the rules of international law was, to begin with, the source of continual confusion. When the confiscation policy was under discussion both sides appealed to the law of nations for a support of their claims. As usual in such controversies, much would have been gained if the direct issue had been clearly stated and kept in mind. Freed from its entanglements the question amounts to this: Does the law of nations allow to a belligerent in a public war the right to confiscate whatever property, within reach of its courts, belongs to the enemy? Numerous misapprehensions and inaccuracies, however, entered into the actual discussion of this issue. There was great difference of opinion as to the applicability of the rules of international law to the conflict then waging. Was the struggle to be regarded as a domestic rebellion, or a public war? Were those supporting the Confederate cause to be treated as rebels or as enemies? In a civil war, is a nation restricted by the rules of international law in its operations against the insurgent power, or may it punish these insurgents by municipal regulations?

But, assuming that the legal character of the Civil War had been determined, a further difficulty remained. There was commonly a failure, in the debates, to discriminate between a general confiscation of property within the jurisdiction of the confiscating government, and the treatment accorded by victorious armies to private property found within the limits of military occupation. Thus the general rule exempting private property on land from the sort of capture which similar property must suffer at sea, was erroneously appealed to as an inhibition upon the right of judicial confiscation.[29]

[29] Even Dunning, in his *Essays on the Civil War and Reconstruction*, though he treats directly the principles of international law involved in the confiscation policy, gives no place to this distinction between military seizure and judicial confiscation. "In the modern practice of civilized nations", he says, "the general confiscation of enemies' private property is unknown. It is as obsolete as the poisoning of wells in an enemy's country. As a rule, real estate is left to its owners, and movables are appropriated only so far as military necessity, as judged by the commander in the field, seems to demand it". Dunning then continues the discussion, still with reference to the treatment of private property by military officers, and for authority refers to the passage in Halleck which deals not with confiscation by judicial process within the jurisdiction of the confiscating state, but with the treatment of property by generals in military occupation of a part of the enemy's country. See Dunning, *Essays*, pp. 31-32.

That a military capture on land analogous to prize at sea was not regarded as a legitimate war measure was so obvious and well recognized a principle that it would hardly require a continual reaffirmation. It was a very different matter, however, so far as the law and practice of nations was concerned, for a belligerent to attack through its courts whatever enemy's property might be available within its limits. Where the language was accurate, it was this form of seizure that was contemplated whenever confiscation was claimed as a belligerent right. In this connection much was said about the relation between conqueror and vanquished, which was also beside the point.

When after the war the question of confiscation as a belligerent right was presented to the Supreme Court[30] the legal precedents were various and doubtful.[31] Though the trend of modern usage favored the milder practice, the court, without arguing the points of international law involved, rested the justification for the second

[30] Miller *v.* U. S., 11 Wallace 268.

[31] Among the early authorities on international law whose opinion would carry weight in America, Vattel and Puffendorf favored the milder practice, Burlamaqui and Rutherford did not deal directly with the form of confiscation adopted during the Civil War, while Bynkershoeck was among the few to state in its bald severity the extreme right of the belligerent over the enemy's property. Grotius, the pioneer authority, in the field of modern international law, allows to a belligerent very extensive rights over the persons and property of the enemy. In his closest approach to the subject of confiscation as understood in the Civil War he admits, though without any indication of individual approval, that the right of appropriation applies to "enemy goods found among us at the outbreak of war". We may class Grotius, then, as a supporter of the belligerent right of confiscation, but in so doing we must bear in mind that, in large part, the tone of his work is that of a reluctant statement of unregenerate practice. To derive clear authority for confiscation indeed from any of these early writers requires a rather sympathetic editing. Vattel, *Law of Nations* (Luke White ed., Dublin, 1792), bk. III., sec. 76; Puffendorf, *Droit de la Nature et des Gens,* liv. VIII., ch. v., sec. xvii ff.; Burlamaqui, *Principles of Natural and Political Science* (Nugent transl., Boston, 1792), pp. 375 ff.; Rutherford, *Institutes of Natural Law* (second Am. ed., 1832), ch. ix., *passim;* Bynkershoek, *Quaestiones Juris Publici* (1737), lib. I., ch. 7, p. 175; Grotius, *De Jure Belli ac Pacis,* lib. III., cap. vi, sec. xiii. In the case of Ware *v.* Hylton, 3 Dallas 199, argued before the Supreme Court in 1796, many prominent American jurists of the time expressed opinions upon the right of confiscation. John Marshall, arguing for Virginia's claim to certain British debts sequestered during the Revolution, declared emphatically for the general right of confiscation, but his attitude was that of an advocate not a judge, and his interpretation of the authorities was not infallible. Later, as Chief Justice, Marshall prepared the opinion of the Supreme Court in Brown *v.* U. S. (8 Cranch 110), a case involving the right of the United States government to seize British property found on land at the commencement of the War of 1812. Basing his sweeping conclusion upon the partial citation of authorities sub-

confiscation act upon the law of nations. The measure was sustained on this broad basis as an "undoubted belligerent right" and was construed as the exercise of a war power, not as a municipal regulation. It is to be observed that there underlay this decision a presumption which had caused much controversy and honest difference of opinion—a presumption which was not rendered less conspicuous by the omission of arguments drawn from the domain of international law. The question was a fair one whether the right of confiscation could be clearly claimed on the basis of the law of nations, and this was a point of much larger importance and greater difficulty than would be indicated by the off-hand assertion of the court that Congress in passing the second confiscation act was exercising "an undoubted belligerent right". It has been an accepted practice in our courts to recognize international law as a "part of our law",[32] and while the judicial branch of the government would not be likely to invalidate a law of Congress on the ground that it violated the rules of international law, it usually takes care to consider these rules as fully as possible, and even to interpret the intent of Congress in the light of such rules. Even though one may not deny the soundness of the position assumed by the Supreme Court, there is still room for the wish that so important a subject had been handled with less superficiality.

mitted by the counsel for the appellant, Marshall wrote: "It may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy". A special act, so the court held, was necessary to authorize such seizures. Story went even further in his dissenting opinion and maintained that the right of confiscation vested at once in the executive on the outbreak of war, without the express provision of any statute. When one seeks the authority which these men quote, however, he is apt to find, in the passage cited, a treatment of capture, or booty, or the levy of contributions—topics quite distinct from confiscation. Story's reference to Puffendorf as a supporter of confiscation is an example of this stretching of the authorities. (8 Cranch 143.) Of the later writers, Kent favored the sterner rule, while Wheaton emphasized the milder practice which, however, he declared to be "not inflexible". Kent (*Comm.*, eleventh ed.), I. 66-67; Wheaton, *International Law* (Boyd ed.), pp. 410, 413.

[32] Hilton *v.* Guyot, 159 U. S. 163; Ware *v.* Hylton, 3 Dallas 281; the Paquette *Habana*, 175 U. S. 700.

IV. THE PROBLEM OF REBEL STATUS

When we study the problem of rebel status in relation to confiscation another series of legal tangles emerges. Though the question of such "status" might appear chiefly theoretical and involve much abstract reasoning, yet it seemed an inevitable requirement of the laws of intellect that men who discussed confiscation should have in mind some guiding principle, either expressed or implied, as to the legal standing of persons engaged in the rebellion. In this connection, therefore, the question bore directly upon the larger legal problems which the Civil War called forth. Here arose the same difficulty which presented itself in connection with the treatment of Confederate privateers, the blockading of southern ports, and the non-intercourse laws.[33] In a different phase the question again forced itself upon the attention of the government after the war when reconstruction issues were pending and the policy of pardon and amnesty was urged by the President and opposed by the radicals of Congress.

At first sight the situation would seem to resolve itself into a simple alternative. On the one hand, the severity of the law of treason could be invoked, and the insurgents could be held liable to treatment as criminals. In this case the government would be acting in the capacity of a sovereign punishing its rebellious citizens for their violation of allegiance. Or, on the other hand, the rebellion could be regarded as a public war, and all the privileges and amenities prescribed by the law of nations for the treatment of belligerents could be accorded to the Confederacy. The government, in taking this attitude, would appear to be laying aside its sovereign control over the South, and opposing the Confederate states only as a belligerent would oppose his enemy. The struggle would then be a clash *between governments,* not a conflict of individuals against their government. There was, however, a third possibility which would be most likely to commend itself to an administration guided by a spirit of expediency or practical opportunism rather than of rigid adherence to consistent principles. Instead of selecting one or

[33] The well-known work of Professor Dunning, *Essays on the Civil War and Reconstruction,* contains the best general discussion of these legal problems which the writer has found.

the other of the two alternatives as an exclusive rule of conduct, the government could suit the rule to the occasion, and adopt whichever course might appear most suitable in a given situation. The theory of traitor status was, in the opinion of many, a convenient justification for certain severe measures which were more or less directly contemplated and which could rest on no other accepted principle, as for instance the condemnation after the war of the principal Confederate leaders under domestic criminal law. It became apparent at once, however, that this severe principle could not be adhered to rigidly. In the ordinary conduct of the war it was the *jus belli,* not the *lex talionis* which must govern the armies. In the declaration of blockade and in the treatment of privateers as public enemies instead of pirates, the administration followed the only rational and humane course possible, but in these particulars the insurgents were undoubtedly recognized as belligerents.

So far the way seemed clearly marked out by the plain dictates of reason and humanity, and there was no serious difference of opinion. When the question of confiscation was reached, however, there was no generally conceded principle around which all could unite, and it was in this connection that the difficulty regarding rebel status reached its most acute stage. The subject was beclouded rather than clarified by the debates. On the one hand the rebels were referred to as red-handed, black-hearted pirates, and traitors,[34] unworthy of claiming a single belligerent right. On the other hand they were represented as a regularly constituted governmental power with an organized administration in control, an authorized army in the field, and with all the attributes of a belligerent in a public war.[35]

It remained for the Supreme Court, in a few clear-cut decisions, to present what seems the only practical solution of the problem, by adopting the convenient and flexible principle of the double status of the rebels. In the Amy Warwick case Justice Sprague thus ex-

[34] See speeches of Elliot of Massachusetts in the House of Representatives (*Cong. Globe,* 37 Cong., 2 sess., p. 2234), Howard of Michigan (*ibid.,* p. 1717), and Davis of Kentucky (*ibid.,* p. 1759).

[35] The words of Blair of Pennsylvania, who favored confiscation, present a good statement of the principle of belligerent status: "What are our relations to these rebellious people? They are at war with us, having an organized government in the cabinet, and an organized army in the field, and I hold that in the conduct and management of the war on our part we are compelled to act towards them as if they were a foreign Government of a thousand years' existence, between whom and us hostilities have broken out". *Cong. Globe,* 37 Cong., 2 sess., p. 2299.

pressed the views of the majority of the court: "I am satisfied that the United States as a nation have full and complete belligerent rights, which are in no degree impaired by the fact that their enemies owe allegiance and have superadded the guilt of treason to that of unjust war".[36] A similar expression is that of Justice Grier in the Prize Cases: "The law of nations . . . contains no such anomalous doctrine as that which this court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not *enemies* because they are *traitors;* and a war levied on the government by traitors, in order to dismember and destroy it, is not a *war* because it is an *'insurrection'*."[37] Again, in Miller *v.* United States: "Whatever may be true in regard to a rebellion that does not rise to the magnitude of a war, it must be that when it has become a recognized war those who are engaged in it are to be regarded as enemies."[38]

With this statement of the broad theoretical problem in mind we may now turn to a detailed phase of the question of rebel status in which its practical application and its bearing upon individual rights stand out clearly. One of the common difficulties confronting the courts in the enforcement of the confiscation acts was to decide whether, in the seizure of property of persons adhering to the rebellion, opportunity should be given to the supposed "rebel" to appear in court and plead his case. On the one hand stood the principle that an enemy has no standing in court, while on the other hand the very nature of the proceeding under the confiscation acts was such that judgment must rest upon a determination of the fact as to whether or not the party was actually engaged in the rebellion—a point on which the owner could claim a right to be heard. Moreover it was ably contended that a quasi-criminal character[39] per-

[36] 2 Sprague 123.

[37] 2 Black 670. See also pp. 672 and 673. As to the necessity of some concession of belligerent rights in the case of a formidable rebellion, see Williams *v.* Bruffy, 96 U. S. 187. There the Supreme Court declared that such concessions depend upon "the considerations of justice, humanity, and policy controlling the government".

[38] 11 Wallace 309.

[39] The Supreme Court is authority for the statement that actions in confiscation were "in no sense criminal proceedings", and were "not governed by the rules that prevail in respect to indictments or criminal informations". The only

tained to confiscation proceedings, requiring the same strict construction of the law in the interest of the accused as belongs to actions brought under a criminal indictment. Such construction would certainly not deny to the suspected "rebel" all opportunity whatever of conducting a defense in court.

The practice during the war on this point was uncertain and frequently detrimental to the interests of the accused. In the district court for the eastern district of Virginia a general rule was prescribed which disallowed a hearing in the case of persons adhering to the rebellion.[40] In a case tried before Judge Betts of the southern district of New York in July, 1863, the defendant, a resident of Alabama,[41] duly filed an answer to the allegations set forth in the libel of information against his property, but the judge ordered this answer to be stricken from the files on the ground that the defendant was an "alien enemy", and hence had no *persona standi* in a court of the United States.[42] An able criticism of Judge Betts's position is to be found in the *Annual Cyclopedia* for 1863. The writer points out that if Betts's doctrine was correct "the mere fact of Mr. Wiley's [the defendant's] residence in a southern insurrectionary state precludes him from appearing and contesting the allegations of the libel that he has rendered active aid to the rebellion. . . . Under such a practice every dollar of property owned by Southern citizens in the North, no matter how loyal, need only be seized under an allegation of disloyal practices, and as the accused cannot be heard to deny that allegation (and if he remains silent no proof of it is required), the whole matter is very summarily disposed of to the great comfort and advantage of the informer, and to the increment of his personal possessions."

This question whether a rebel should have a hearing in a federal court on the issue of the condemnation of his property waited till after the war for its settlement by the Supreme Court. The case

subject of inquiry in such cases, in the opinion of the court, was the liability of the property to confiscation, and persons were referred to only to identify the property. (The Confiscation Cases, 20 Wallace 104-105. In this case there were three dissenting judges.) For a vigorous statement of the view that the confiscations partook largely of the nature of criminal statutes, see Field's dissenting opinion in Tyler *v.* Defrees, 11 Wallace 331, and Lincoln's proposed veto message, *Senate Journal*, 37 Cong., 2 sess., July 17, 1862, p. 873.

[40] Semple *v.* U. S., 21 Fed. Cas. 1072.

[41] *Annual Cycl.*, 1863, p. 220.

[42] Jecker *v.* Montgomery, 18 Howard 112, and cases cited.

was that of McVeigh *v.* U. S.—one of the prominent confiscation cases.[43] In its facts the case resembled that in which Judge Betts had given his radical decision. A libel of information had been filed in the eastern Virginia district to reach certain real and personal property of McVeigh who was charged with having engaged in armed rebellion. McVeigh appeared by counsel, interposed a claim to the property, and filed an answer to the information. By motion of the district attorney, however, the appearance, answer, and claim were stricken from the files for the reason that the respondent was a "resident of the city of Richmond, within the Confederate lines, and a rebel". The property was condemned and ordered to be sold. When the case reached the Supreme Court the judgment was reversed, and the action of the district attorney unanimously condemned. The court held that McVeigh's alleged criminality lay at the foundation of the proceeding, and that the questions of his guilt and ownership were therefore fundamental in the case. The order to strike the claim and answer from the files on the ground that McVeigh was a "rebel" amounted to a prejudgment of the very point in question without a hearing. The court below in issuing this order had acted on the theory that no enemy of the United States could have standing in its courts, but the higher tribunal refused to allow such an application of this principle. On this fundamental question, therefore, the Supreme Court was committed to the proposition that a "rebel" should not be denied the right to a hearing in connection with the seizure of his property by a federal court. Had this conclusion been pronounced early enough to produce uniformity of practice during the war, and had the Supreme Court itself maintained this principle consistently, the advantage of the McVeigh decision would have been far greater than was actually the case.

[43] 11 Wallace 259; see also Windsor *v.* McVeigh, 93 U. S. 274.

V. THE DURATION OF THE FORFEITURE

We consider under this caption the legal controversy as to whether judgments against the property of "rebels" should involve the surrender of the full title in fee simple, or only a life interest. In spite of the fact that Congress took special pains to be explicit on this point, even to the extent of passing a joint resolution explanatory of the original statute,[44] it seems to have been variously interpreted. Judge Underwood of Virginia, in the Hugh Latham case, argued for the absolute forfeiture of real estate as in keeping with the intention of the constitution and the statute. Congress did not mean, declared the judge, that the "traitor" should merely surrender a life inerest, but only that the forfeiture must be perfected during his life. As for the joint resolution, he interpreted it as merely intended to keep the legislation within the constitutional rights of Congress which permit no attainder of treason that shall "work corruption of blood or forfeiture *except during* the life of the person attainted".[45] The words "except during" were held to apply to the specific legal act by which the forfeiture was accomplished, rather than to its duration.

When, however, this important question was presented to the Supreme Court in 1869, the reasoning of Judge Underwood was set aside, and the duration of the forfeiture was held to terminate with the life of the offender. One Douglas Forrest had brought suit in a Virginia court to recover the forfeited estate of his father French Forrest, who had been a Confederate naval officer, and the case was appealed to the Supreme Court.[46] The original confiscation had taken place in 1863, and no question was raised as to the regularity of the confiscation decree, or the validity of the marshal's sale under it. Forrest maintained, however, that only a life interest had been conveyed by this sale, while the plaintiff, Bigelow, claimed a right in fee simple to the property. The court decided that the act of 1862 and the accompanying explanatory resolution are to be taken together, and that they "admit of no doubt that all which could under the law become the property of the United States, or

[44] Supra, p. 12.
[45] McPherson, *Hist. of the Rebellion*, p. 206.
[46] Bigelow *v.* Forrest, 9 Wallace 339.

could be sold by virtue of a decree of condemnation and order of sale, was a right to the property seized terminating with the life of the person for whose act it had been seized". No title could therefore be conferred, which would outlast the life of the original offender.[47]

As to forfeitures under the act of 1861, their effect was held to be absolute, permitting no recovery of the property by the owner's heirs. The reasoning of the Supreme Court in this connection emphasizes the difference in the nature of the two acts.[48] Whereas proceedings under the act of 1862 were directed against the owner, because of his quasi-criminal character, the proceedings under the act of 1861 were directed merely against the property. Nothing was said about treason; therefore the principles of attainder would not apply. Condemnations under this act were based upon the hostile use of the property, and were regarded as analogous to the condemnation of goods for smuggling or for violation of non-intercourse regulations, and this interpretation required that the whole title be surrendered.

[47] See also, on the duration of the forfeiture, Day *v.* Micou, 18 Wall. 156; U. S. *v.* Clarke, 20 Wall. 92; Waples *v.* Hays, 108 U. S. 6.

[48] Kirk *v.* Lynd, 106 U. S. 315.

VI. REVERSIONARY RIGHTS IN CONFISCATED PROPERTY

THE points just noted regarding the duration of the forfeiture are intimately connected with the difficult problem of the reversionary right in confiscated property. A deed to the life estate in a piece of realty secured at a confiscation sale does not carry a title in fee to the property, since the heirs of the "rebel" owner have a future interest which takes effect upon his death. Such a situation affords an excellent example of a "reversion", which has been defined as "the estate left in a party after he has conveyed away less than a fee".[49] This naturally involves a "reversionary tenant", *i. e.*, a holder of the future rights which revert when the user's interest terminates. It is well understood in realty law that such a reversionary right in property is marketable, and may be transferred.[50] The question arose frequently whether, after confiscation proceedings had been completed, the dispossessed "rebel" could still consider himself as the holder and possible conveyer of that remaining share in the estate which subsisted after the life interest had been transferred. It is clear that if he could convey this expectant right the penalty of his forfeiture would be much less severe. We may now turn to some of the judicial pronouncements dealing with this problem.

In the case of Wallach *v.* Van Riswick, appealed to the Supreme Court in 1875, the question was presented whether the former owner of a confiscated estate could transfer by deed the suspended fee to the property.[51] The court expressed the opinion that Congress had passed the second confiscation act with the purpose of completely dispossessing the owner of all benefits in the property seized, and had not intended to permit him to retain any right of conveyance whatever; that the forfeiture while it lasted was complete,—"a devolution upon the United States of the owner's entire right"; and that the provision regarding the duration of the for-

[49] *American Law and Procedure* (pub. by Lasalle Extension University, Chicago), V. 92. See also Kale, *Future Interests*, secs. 68; 121 foll.

[50] Burton *v.* Smith, 13 Peters 480; Hempstead *v.* Dickson, 20 Ill. 193; Williams on Real Property, p. 256.

[51] 92 U. S. 202.

feiture was introduced for the advantage of the children and heirs alone, not as a "benefit to the traitor by leaving in him a vested interest in the subject of the forfeiture". While evading the theoretical question as to where the suspended fee resided during the life of the "traitor" the court nevertheless declared that it could not dwell in the offender, since Congress did not intend that he should be the tenant of the reversion. On the basis of such arguments the court ruled that the offender had no power to dispose of the future title to his property.

It would be hard to find a more categorical and positive declaration of law than the Wallach decision, and yet in the course of a few years the Supreme Court gradually retreated from its position as there stated, until it had virtually reversed its opinion. We find various decisions in which it was maintained that after the death of the offender, his heirs secure the property by inheritance, and not by grant from the government. This would tend to place the suspended fee in the offender and make him the tenant in reversion.[52] In the case of the Illinois Central Railroad *v.* Bosworth,[53] the court argued that after confiscation the fee remained in abeyance, and then, adopting a figure of shadowy personification, declared: "It is not necessary to be overcurious about the intermediate state in which the disembodied shade of naked ownership may have wandered during the period of its ambiguous existence. It is enough to know that it was neither annihilated nor confiscated, nor appropriated to any third party". The court then argued that the "naked fee" subject to the usufruct of the purchaser under confiscation proceedings, remained in the offender himself, though without any power on his part to dispose of it. The next step was to maintain that by reason of special pardon or general amnesty after the war, the disability to dispose of the permanent title was removed.

Finally, in connection with an Ohio case in 1892, came the practical reversal of the Wallach decision.[54] The property of one Jenkins had been confiscated in 1863 and purchased by one Collard. In 1865 Jenkins transferred to Collard all his interest and estate in the property for a consideration of $18,000 accompanying the

[52] Avegne *v.* Schmidt, 113 U. S. 293; Shields *v.* Schiff, 124 U. S. 351.
[53] 133 U. S. 92.
[54] 145 U. S. 552.

transaction with a covenant of general warranty[55] binding himself and his heirs. The court was called upon to settle whether the title thus conveyed was valid against the Jenkins heirs, or in other words whether Jenkins could dispose of these reversionary rights. The court summarized the earlier decisions and criticized at some length the opinion in the Wallach case. The ground of the criticism was that the ruling imposing on the offender the disability to transfer the reversionary rights was based not upon any express provision of the statute, but upon what the court thought the policy of confiscation to involve—in other words, it was a piece of "court-made law". Then, applying the law to the Jenkins case in the light of its later judgment, the Supreme Court ruled that the offender, by his covenant of warranty, could convey a permanent future assurance of title which would hold good against all the claims of his heirs.

In effect this was of course a reversal of the rule set up in the Wallach case.[56] A study of the steps taken in this whole series of legal changes seems to reveal an increasing tendency toward a more liberal interpretation of harsh statutes, while it suggests at the same time the difficulty of consistently applying the confiscation acts in the details of individual cases.

[55] By issuing a "covenant of warranty" the grantor assures the grantee that he shall not at any future time be evicted by paramount title. Bouvier, *Law Dictionary.*

[56] If any mistake or fault can be attributed to the court, it probably consisted in taking an unnecessarily extreme position in the Wallach case. The point in dispute could have been satisfied by merely ruling that at the time of the transaction in question Wallach was disabled from conveying the fee, and such a position would have been consistent with the later rulings. (For a summary of all the decisions relating to this subject, see U. S. *v.* Dunnington, 146 U. S. 338.)

VII. THE CONSTITUTIONALITY OF THE CONFISCATION ACTS

A PROBLEM more fundamental perhaps than any of the above was that which concerned the constitutionality of the confiscation acts. It was not surprising that this legislation which had been enacted against the judgment of many of the ablest thinkers in Congress, which had barely escaped the presidential veto, and which had occasioned the greatest uncertainty in its judicial enforcement, should have to meet sooner or later that peculiar ordeal to which all American laws are liable—the test of constitutionality. The wonder is that the test was deferred so long, for it was not until 1871 that the matter of constitutionality was made a direct issue before the Supreme Court. The case was that of Miller *v.* United States—a proceeding under both of the confiscation acts to forfeit certain shares of railroad stock in two Michigan corporations.[57] The information filed against this stock alleged it to be the property of Samuel Miller, a Virginia "rebel". An essential feature of the case was the fact that Miller had disregarded the notice and the district court in Michigan, without a hearing of the case, had entered a decree of condemnation by default. Miller's attorney complained that the acts of Congress on which the seizure and the condemnation by default had been based were unconstitutional, involving a violation of the fifth and sixth amendments, which have to do with the guarantees of due process of law and of property rights.

The court met the defendant's objections by a liberal reliance on the "war power" and by reference to earlier decisions in which related problems had been settled. The primary question of the nature of the Civil War had been fully treated in the Prize Cases,[58] where the court had defined the conflict as one of sufficient magnitude to give the United States all the rights and powers appropriate to a foreign or national war. The belligerent rights of the United States, then, were not diminished by the fact that the conflict was a civil war. In the same decisions the relation of the Union government to the insurrectionary districts was dealt with, and the rights both of a sovereign and a belligerent were held to belong to the

[57] 11 Wallace 304 ff.
[58] 2 Black 673.

government of the United States. The court proceeded on the basis of these previous decisions to analyze the confiscation acts and defend their constitutionality. The most important problems before the court under the head of constitutionality were: first, to decide under what category to place confiscation, *i. e.*, whether to regard it as the exercise of war power or as a municipal regulation; and second, to deal with the objection that the act violated the fifth and sixth amendments relating to rights of property and of impartial trial. As to the first of these problems the court laid down the doctrine that the confiscation acts were not passed as a municipal regulation but as a war measure. With a tone of certainty which, as we have seen, the precedents hardly warranted, the court declared that "this is and always has been an undoubted belligerent right". Congress had "full power to provide for the seizure and confiscation of any property which the enemy or adherents of the enemy could use for the purpose of maintaining the war against the government". The act of 1861, and the fifth, sixth, and seventh sections of the act of 1862, were therefore construed as an enforcement of the belligerent rights which Congress amply possessed during the Civil War.

Having thus placed the confiscation acts within the category of war measures, the court found little difficulty in meeting the objection that the acts involved a violation of the fifth and sixth amendments. The relevant provisions in these amendments are that no person shall be deprived of his property without due process of law, and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. The acts, as we have above noted, permitted judgment on default without a jury trial, without a personal hearing, and without a determination of the facts as to the guilt of the owner. It was admitted by the court that if the purpose of the acts had been to punish offenses against the sovereignty of the United States, *i. e.*, if they had been criminal statutes enacted under the municipal power of Congress, there would have been force in the objection that Congress had disregarded its constitutional restrictions. Since, however, the acts were passed in exercise of the war powers of the government, they were held to be unaffected by the limitations fixed by the fifth and sixth amendments.

Three of the judges, Field, Clifford, and Davis, dissented from this opinion. Their grounds of disagreement were that the forfeitures in question were punitive in their nature, being based on the municipal not the war power of Congress, that condemnations must depend on the personal guilt of the owner, that judgments against the property should only result from proceedings *in rem* to ascertain the guilt or innocence of the supposed offender, and that therefore a judgment based on mere default in such cases would amount to a denial of "due process of law". These words of the dissenting judges not only agree exactly with one of the important points in Lincoln's objections, but they harmonize very well with the position of the Supreme Court itself when dealing with the problem whether a "rebel" should have a hearing. We noticed in connection with the McVeigh case that the court insisted upon the necessity of a hearing to determine the question of the owner's alleged rebellion. The dissenting judges in the Miller case were merely applying this same principle to the case of default. It was not even necessary, said the majority of the court, to conduct an *ex parte* hearing after the default. The entry of the default in due form was to be regarded as establishing all the facts averred in the information, as in the case of confession, or of actual conviction on evidence. It was this principle which, according to the minority view, would involve serious judicial usurpation, and "work a complete revolution in our criminal jurisprudence". To the thoughtful student this view of the minority judges seems but a natural protest against an extreme and unjust claim. The dissenting position appears still stronger when it is remembered that the majority judges admitted the incompetency of Congress to allow such judgments as the confiscation acts permitted on the basis of municipal law, and that the "war power" theory was the convenient door of escape from this constitutional difficulty.

The above survey of legal problems may perhaps be sufficient to suggest the difficulty and uncertainty with which the courts labored in executing these measures of confiscation. It is often the case with mooted points of law that the period of the greatest diversity of opinion is also the period when the number of cases involved is greatest, and when therefore the pressure upon the judicial authorities is heaviest. In the case of these legal difficulties regarding

confiscation their final settlement did not occur until after the war; in some cases so long afterward that the issue was practically dead, and little benefit could be secured from the decisions as guides to the lower tribunals. When during the war we find doubt on such fundamental points as the constitutionality of the law itself, and the question as to whether a rebel could be heard in his own defense, we need no longer wonder that judicial action in these cases was so often unsatisfactory. When in addition to this we remember that during the war both Congress and the courts did their work under heavy pressure, and sometimes in haste and confusion, we can better understand such mistakes and shortcomings as appear in connection with the execution of the confiscation policy. To carry out a war measure by peaceful process is a rather anomalous undertaking, yet this is what the strict judicial enforcement of the confiscation policy amounted to. We must remember, too, that these measures were exceptional, that they could be justified only on extreme grounds, and that they touched human nature in a very weak place.

VIII. FORFEITURES UNDER THE DIRECT TAX LEVY

As closely related to the general subject of judicial forfeiture we may include within our study a form of seizure which practically amounted to confiscation, though carried out under legal forms quite different from those of the confiscation acts. We refer to seizures based upon an act of June 7, 1862,[59] "for the collection of direct taxes in insurrectionary districts within the United States". An earlier statute, that of August 5, 1861,[60] providing for a direct tax to secure war revenue, had apportioned quotas to all the states, including those in insurrection. It was now enacted that in those states or districts where this act could not be peaceably executed, special tax commissioners should be appointed by the President who, as soon as the military authority of the United States could be established, should make assessments "upon all the lands and lots of ground" situated in the insurrectionary territory. This assessment was to be based upon the real estate valuation in force in 1861. A penalty of fifty percent of the tax proper was made an additional charge upon these lands. Upon default of the owners to pay the tax, the land was to be forfeited to the United States, and the commissioners in that case were to conduct public "tax sales", selling to the highest bidder, or bidding in the property for the United States. The tax sale certificate of the commissioners was to be sufficient to convey a title in fee simple to the land, free from all encumbrances.

Commissioners were appointed in accordance with this statute for each of the eleven insurrectionary states. It was not possible, of course, for the act to be carried out uniformly throughout the South. Only in those districts where the Union forces maintained some foothold could these tax sales be conducted. The following table indicates the extent of this partial enforcement of the law:

[59] *Stat. at Large,* XII., 422.
[60] *Ibid,* 294 foll.

PROCEEDS OF SALES BY UNITED STATES TAX COMMISSIONERS FOR NON-PAYMENT OF THE DIRECT TAX OF AUGUST 5, 1861.[61]

Virginia	$113,130.57
South Carolina	370,000.00
Florida	64,705.87
Arkansas	48,067.24
Tennessee	101,970.52

The Union government could hardly have devised a measure more odious to the people of the South. The levy of a federal tax directly upon particular plots of ground in regions where ideas of states' rights were so strong as in the Southern states was particularly distasteful, and the fact that this method was not adopted in the North made the partiality of the measure the more apparent. The tax collector of the enemy's government was thus brought into immediate relations with the helpless citizens of those portions of the South which fell into Union possession, and this unfortunate situation naturally awakened the deepest resentment. Objection was made that in view of the added penalty of fifty percent, required only in the insurrectionary states, the tax was not proportionately levied, and was therefore unconstitutional. In dealing with this objection the Supreme Court held that the fifty percent penalty was no part of the tax, but was a fine "for default of voluntary payment in due time". The validity of the tax under the constitution was therefore upheld.

Various objections were also urged against the special features of the act by which it differed from ordinary provisions for tax sales. A valuable estate, for instance, would be sold to pay a trifling tax, and the surplus over and above the tax, instead of being paid to the owner, as in the usual tax sale, was turned into the United States treasury. Moreover the customary privilege of redemption which belongs to the dispossessed owner in the ordinary tax sale, was denied. Whatever this sort of proceeding might be called, it is clear that its *effect* was confiscation. In some cases commissioners required the owners to pay the tax in person, which was often an impossibility. The question was significantly raised whether these

[61] *Cong. Globe*, 42 Cong., 2 sess., p. 3387.

extraordinary discriminations were consistent with the constitution, and whether such a form of procedure could be called "due process of law". Even granting that the federal government had any claims to sovereignty in the South which would justify the levying of a tax upon them during the rebellion, it is difficult to see how these sweeping forfeitures can be defended on the ground of "tax sales".

The most notable instance of seizure under the direct tax legislation was the case of the famous Arlington estate in Virginia, belonging to General Robert E. Lee.[62] A tax amounting to $92.07 was levied upon this estate, and in September, 1863, the whole property was sold for its non-payment. The tax commissioners bid in part of the estate for the federal government at $26,800. For other portions of the estate there were various other purchasers. The grounds acquired by the government were made into a national cemetery for the graves of Union soldiers.

After the death of Mrs. Robert E. Lee, her son, G. W. P. C. Lee, claiming to have valid title to Arlington, petitioned Congress to vote compensation to him in return for which he would yield all his rights in the property and avoid litigation for its recovery.[63] He based his claim on the ground that the sale of the property by the commissioners amounted to confiscation, and could not be held valid. The extraordinary measures adopted to enforce the tax were, he argued, unconstitutional. Instead of the sale of only so much of the property as was necessary to pay the tax with interest and penalties, the whole estate was forfeited to the United States and sold. In this case the amount of the tax had actually been offered by Mrs. Lee through her agent, but the commissioners had refused to accept such payment, and the petitioner declared that this refusal rendered the whole proceeding void. Further, it was urged, that the United States could not in justice secure more than a life interest, and that the national legislature could not acquire jurisdiction over this estate without the consent of Virginia. This petition was referred to the Committee on Judiciary, and was not heard of further.[64]

[62] J. K. Hosmer refers to the seizure of Arlington as if it were a case under the Confiscation Act itself. As a matter of fact, no process of confiscation, as such, was undertaken. Hosmer, *Appeal to Arms,* (Am. Nation, vol. 20), p. 172.

[63] *Sen. Misc. Doc.* 43 Cong., 1 sess., No. 96.

[64] *Cong. Record,* 43 Cong., 1 sess., vol. II., pt. 3, p. 2812.

The next phase of this case was a suit brought first in the United States circuit court in Alexandria, Virginia, and later appealed to the Supreme Court, in which the title of the United States under the tax sale certificate was contested. The decision in the case of United States *v.* Lee is long and technical.[65] The lower court had declared Lee's title valid, and this decision was affirmed. The arguments of the court, however, did not attack the validity of this general class of tax sales; it was rather the conduct of these particular commissioners which was denounced. In spite of the principle that the United States cannot be sued without its consent it was held that action could properly be brought against persons whose acts as agents of the United States might interfere in an unwarranted way with individual property rights. Since in this case the commissioners had established the rule that owners must pay the tax in person, payment was thus made impossible in the majority of cases, and where the amount of the tax had been tendered through an agent and refused, no proceedings could be legally begun which depended upon the voluntary default of the owner to pay the tax. Any tax sale certificate secured under such regulations was therefore held to be invalid.

In view of this decision an appropriation became necessary in order to establish the title of the United States to the Arlington cemetery.[66] The matter was finally settled by the payment of $150,000 as compensation to the Lee heirs, in return for which a release of all claims against the property was secured.[67]

The direct tax seizures in South Carolina illustrate further the inequalities which were inherent in this form of proceeding.[68] The operations of the tax commissioners were confined to a few parishes in the eastern portion of the state, but assessments were based upon a uniform apportionment of the quota throughout the whole state. The total quota for South Carolina was $363,570.66. The commissioners collected $210,789.32 as taxes, and $28,232 as proceeds of sales for non-payment of the direct tax. Besides this, considerable profit was secured to the government by the disposition of such property as was bid in for the United States by the commissioners

[65] 106 U. S. 196.

[66] *Cong. Record,* 47 Cong., 2 sess., vol. xiv, pt. 3, p. 2680.

[67] March 3, 1883. *U. S. Statutes,* 47 Cong., 2 sess., ch. 141, p. 584; *Cong. Record,* 47 Cong., 2 sess., vol. xiv, pt. 4, p. 3661.

[68] House Doc. 45 Cong., 3 sess., no. 101.

at the tax sales instead of being sold to private purchasers. Part of such property was held by the government and rented; part was sold to loyal citizens; part was purchased by soldiers, and part was sold to heads of families. The proceeds of these various transactions, added to the amount actually collected as taxes, or secured from original sales for non-payment, yielded an approximate sum of $512,338, which exceeded the original quota of the whole state by $148,768. It will thus be seen that though the tax was enforced in only a portion of the state, yet the total proceeds derived by the government from all the various transactions connected with the collection of the tax were far in excess of the state's full quota. It might well be claimed, therefore, that a double inequality was involved; a portion of the citizens were made to pay while others went free, and the state as a whole was bearing more than its proportionate share of the "tax".

There was, moreover, in the case of two parishes, those of St. Luke's and St. Helena, a still further hardship.[69] Here there was a general failure of the owners to appear and pay the tax, and the commissioners disposed of a large quantity of land at public auction at a very low price. Most of this land was not acquired by private parties, but was bid in for the government by the commissioners, and later the property was *sold to the former owners* for amounts greatly in excess of the sums at which the commissioners had bid in the property for the United States. In one case a lot bid in at $100 was later resold to its former owner for $2,600. Judge Nott of the Court of Claims characterized this divestiture of property as "exceedingly pitiable", and attributed such a policy to the "harsher judgments of the war".

These, we may remark, are effects of the direct tax which have been generally overlooked, since the chief attention of the national Congress has been given to the heavy share of the tax sustained by the "loyal" states as compared with the "insurrectionary" states. With these larger phases of the question which have become a matter of familiar history, we are not at present concerned, since the subject comes under our notice not as a tax, but as involving an unequal and oppressive kind of forfeiture which amounted to virtual confiscation.

[69] *House Doc.* 45 Cong., 3 sess., no. 101, p. 2.

Although various attempts were made to secure legislation adjusting the many inequalities which resulted from the direct tax of the Civil War, nothing was done along this line until March 2, 1891, when an act was passed providing for a refunding of the amounts paid by the several states and territories under the direct tax of August 5, 1861.[70] So far as restitution was possible for the forfeitures of which we have been speaking in this chapter, they were provided in this act. Special provision was made for compensating those who lost their lands in South Carolina, and a general repayment was provided for the benefit of all owners in any state, whose lands had been bid in and sold under the provisions for collecting this tax. Jurisdiction was given to the Court of Claims over cases arising under these provisions for restitution, and its decisions were fairly liberal, but such tardy restorations could, of course, only partially undo the effect of the original forfeitures.[71]

[70] 26 *Stat. at Large,* 822.

[71] The following are examples of such decisions: Chaplin *v.* U. S., Ct. Cl. Rep. 29, p. 231; Glover et al. *v.* U. S. Ibid, p. 236; Means *v.* U. S. Ct. Cl. Rep. 31, p. 245; Hogarth *v.* U. S. Ct. Cl. Rep. 30, p. 346.

IX. CAPTURED AND ABANDONED PROPERTY

We have so far been confining our attention to cases of confiscation by judicial action. It should be remembered, however, that the two specific laws of confiscation, providing for the judicial seizure of "rebel" property in federal courts, formed only an ineffective part of a larger policy of *virtual* confiscation which contemplated the employment of an elaborate machinery for appropriating the goods of the enemy. In the previous section on the direct tax we noticed one important form of virtual confiscation, and we now turn to another and more sweeping system of appropriating property which was non-judicial in character.

The confiscation acts involved the prosecution of suits in federal district courts, and this was obviously impossible in insurrectionary districts where no such courts were in operation, and where peaceful judicial process was impracticable, even though the Union forces might be in occupation of the territory. It was to be expected, however, that as the federal armies advanced they would make captures of large amounts of private property, especially cotton, and that there would be left in their train estates and miscellaneous property which had been abandoned by the owners. Much of this property would necessarily be of such a nature that the military authorities could not dispose of it, and unless some action were taken it would be left without ownership. It was also thought desirable to encourage the capture of some of the staple products of the South, not for direct military use, but as a means of reducing the enemy's resources, and adding to the resources of the Union government.

To meet this situation Congress passed, March 12, 1863, the act relating to "captured and abandoned property".[72] Under this law the Secretary of the Treasury was to appoint special agents to collect property of this kind in the insurrectionary territory. The agents were to have nothing to do with property used for waging war,

[72] *Statutes at Large*, XII., 820. According to an opinion submitted to the Treasury Department by Attorney-General Speed, July 5, 1865, property hostilely seized by the military authorities on land was to be regarded as "captured", while the term "abandoned" was held to apply to property "whose owner shall be voluntarily absent and engaged in, aiding, or encouraging, the rebellion". *Sen. Doc.* 40 Cong., 2 sess., no. 22; U. S. *v.* Padelford, 9 Wallace 531.

such as arms, ordnance, ships, etc., nor were they to have any authority over maritime prizes. The property thus collected was either to be devoted to public use on due appraisement and certificate, or to be forwarded to some place of sale in a loyal state, and the proceeds turned into the treasury. Provision was made in the law for restoration to loyal owners after the war.

This act of Congress was essentially an exercise of the belligerent right of confiscation, in a form different from that of the confiscation acts, and applying to property which the latter could not touch. The competence belonged to Congress, according to the Supreme Court, to provide for the forfeiture of the property of *all persons* within the Confederacy, loyal as well as disloyal, on the principle that all inhabitants of enemy territory are enemies.[73] This, however, would have been an extreme measure, and the restoration of the property of loyal citizens was therefore provided for, but in doing so, Congress was renouncing a part of its strict belligerent rights as the Supreme Court understood them.[74]

The Treasury Department proceeded vigorously in carrying out the provisions of this law, and soon developed an elaborate administrative machinery for collecting and marketing captured property.[75] A general agent was given charge of the whole work, under whom was placed a large corps of supervising agents and local agents, who were in turn assisted by "agency aids", and customs officers specially designated for this work by the Secretary of the Treasury.

This army of treasury officials which was thus set upon the trail of captured property in the South did not find their chase a holiday pastime.[76] Even though within the Union lines, they found

[73] Young *v.* U. S., 97 U. S. 396; U. S. *v.* Winchester, 99 U. S. 372, at p. 375.

[74] Briggs *v.* U. S., 143 U. S. 346, at p. 356.

[75] Secretary Fessenden's Circular of Instructions concerning commercial intercourse, and captured and abandoned property, July 29, 1864. The first stages of the work of enforcing the Captured Property Act are discussed in *Finance Report* 1863, pp. 23-24.

[76] A general description of the methods used in collecting captured property is to be found in Secretary McCulloch's report, Nov. 8, 1866, *House Ex. Doc.* 39 Cong., 2 sess., no. 97. To secure unpublished material concerning the operations of the treasury officials, search has been made in the files of the Miscellaneous Division of the Treasury Department, where the records concerning captured property are deposited. Here much testimony, more or less reliable, is to be found in the form of affidavits, financial certificates, and official reports. This material is the chief source of the data upon which this section is based.

that they were in the enemy's country, and that the inhabitants had either deserted or were hostile to the removal of property. Cases of personal injury to the officials were frequent enough to render the work highly dangerous. Marks and other evidences of the character and ownership of the cotton were often destroyed, and cotton was often hauled to the woods or swamps and concealed in advance of the agent's arrival, or in cases where this was impossible, it was frequently burned. Agents of the Confederate government were at the same time abroad through the South collecting cotton, and this complicated the work of the Union officials, while it increased the tendency to evasion on the part of private owners.[77] Naturally much of the cotton so collected was in unfit condition, and needed overhauling and rebaling before being placed on the market. Above this difficulty, there still remained the danger of secret raids upon the government depots, resulting in the theft or demolition of the cotton, or perhaps the substitution of an inferior grade for that contained in the government store. Sales were required to be conducted in the loyal states, but a serious obstacle to this plan was the lack of sufficient means of transportation. Naturally the chief concern of the quartermasters in the field was the forwarding of supplies to the army, and they showed little zeal in co-operating with the treasury agents for the removal of captured property.

Because of the perilous character of this work of bringing in property from the insurrectionary districts, the government offered large inducements to private individuals who would undergo the necessary risks. Treasury officials offered to pay 25 percent of the proceeds to any who would bale up and bring in cotton and deliver it to the agent at one of the shipping ports. This form of contract did not authorize purchases within the Confederate lines.[78] A

[77] It is well known that considerable cotton was burned by the Confederate authorities to prevent it from falling into the hands of the Union government. Among the Confederate cotton records, in charge of the Miscellaneous Division of the Treasury Department, is a book containing the names of persons who had made claims on the Confederate treasury for cotton destroyed by their own forces, among whom was President Jefferson Davis who made claim for two hundred bales burned. The following are published documents dealing with this general subject: Report of A. Roane, Chief of Confederate Produce Loan Office, *House Misc. Doc.* 40 Cong., 1 sess., no. 190, p. 39; Report of DeBow, General Confederate Cotton Agent, *Ibid;* Treas. Dept. Circular, Jan. 9, 1900, no. 4. See also account of the facts in Mrs. Alexander's Cotton, 2 Wallace 405.

[78] *House Ex. Doc.* 39 Cong., 2 sess., no. 97, p. 3; U. S. *v.* Lane, 8 Wallace 185.

peculiar kind of executive permit, however, was issued by President Lincoln which authorized the holder, even over the protest of the military authorities, to pass through the lines and seize property in the insurrectionary districts, the licensee being allowed to keep three-fourths of the proceeds.[79] After Lincoln's death, some of the licensees were deprived of the property, and the proceeds were put into the treasury. The Supreme Court decided that the President had no power to make these contracts, since they were in violation of the non-intercourse acts.[80] Wherever purchases were made beyond the lines of military occupation of the federal forces they were outlawed. Later, however, Congress by a special act came to the relief of claimants who were thus dispossessed.

As might be expected, this system of collecting property produced many irregularities and cases of fraud. Individuals under contract to collect and deliver cotton to a Union agent would often seize property which they had no right to touch, or would collect heavy bales of good quality and turn over to the government light bales of poor quality. Residents in some cases represented themselves as agents for the Union government, and simply robbed under this pretended authority, not condescending to show by what right they made their seizures. Agents themselves blundered at times because of a misunderstanding of their duties, or committed outrages in deliberate dishonesty. The unscrupulous agent, of course, had exceptional opportunities for gain. In the process of repacking, large quantities of cotton might be abstracted and disposed of at private sale. False reports might be submitted, thus concealing the true amount received. Immediate supervision might be evaded by the pretext of direct orders from Washington to dispose of the cotton in some other way than through the office of the next superior agent. In certain districts, military authorities were implicated in defrauding the government, and in such a situation, lawless bands of thieves were encouraged while good citizens were intimidated.

Considering these difficulties, the Captured Property Act was extensively enforced. As reported officially in May, 1868, the gross proceeds from the sale of cotton were $29,518,041, and the gross

[79] Report of House Com. on Judiciary, *House Reports*, 45 Cong., 3 sess., no. 83. In the case of U. S. *v.* 129 Packages, 27 Fed. Cas. 284, such a permit was used fraudulently to ship whiskey into a Union camp.

[80] Ouachita Cotton Case, 6 Wallace, 521; McKee *v.* U. S., 8 Wallace 163.

proceeds from miscellaneous property, $1,309,650. The net total of captured and abandoned property was $25,257,931.[81]

It will be seen that over ninety-five percent of the property handled by the treasury agents was cotton. It is not hard to understand why this important commodity was so eagerly sought by the Union authorities. Being the greatest staple product of the South, it was regarded as their most valuable source of wealth, and was held to contribute so directly to the support of the rebellion that it should not be regarded in the same light as ordinary private property. It was declared by the Supreme Court to be a proper subject for capture by the Union authorities during the Civil War, and not to be protected by the general rule of international law which condemns the seizure of private property on land.[82]

[81] *Sen. Ex. Doc.* 40 Cong., 2 sess., no. 56, p. 52.

[82] Mrs. Alexander's Cotton, 2 Wallace 404; Briggs *v.* U. S., 143 U. S. 346, 357; Whitfield *v.* U. S. 92 U. S. 165. In the last case the court declared that cotton was "during the late war, as much hostile property as the military supplies and munitions it was used to obtain".

X. THE ADMINISTRATION OF ABANDONED ESTATES

THE control of deserted houses and plantations was one of the important problems involved in the execution of the Captured and Abandoned Property Act. Property whose owner was absent in aid of the insurrection was legally regarded as "abandoned", and was given over to the jurisdiction of the Treasury Department.[83] No attempt was made to disturb the title to this deserted property, some of which, in sipte of the legal definition, was understood to belong to loyal owners; it was merely held under the temporary control of the Union officials, ready to be returned to its owners after the war in the event of their loyalty being proved, or to be confiscated if owned by a "rebel". The property was ordinarily put in the hands of tenants who engaged to cultivate it, but in some cases, especially in towns, it was appropriated to the relief of needy applicants who could show both poverty and loyalty.

The machinery for administering these abandoned estates, as illustrated by the case of Louisiana,[84] involved a plantation bureau at New Orleans, in charge of a "Superintendent of Plantations" under whom was placed a corps of agents and inspectors whose function it was to keep the central office in touch with the large number of lessees and occupants to whom the estates were leased or granted. The rents and proceeds derived from this period of temporary control were appropriated by the government, and turned in as a part of the captured and abandoned property "fund".

The disturbance of the ordinary conditions of life which is incidental to warfare, was nowhere more strikingly revealed than in connection with this system of operating deserted plantations. Neglect of improvements, dilapidation of buildings, and deterioration due to inexperienced farming were everywhere evident. The lessee's interest naturally extended only to the harvesting of the im-

[83] *Stat. at Large,* XII, 820, sec. 1; XIII, 375.

[84] The records of these transactions are deposited in the archives of the Treasury Department at Washington, in charge of the Miscellaneous Division. The following titles will indicate the nature of this unpublished material: List of Plantations transferred to the Treasury Department, third agency, by S. B. Holabird, Col. and Chief Quartermaster, Dept. of Gulf, Oct. 1, 1863; Plantation Inventories, Bk. no. 74; Plantation Bureau Records, containing inspectors' reports, Bk. no. 72.

mediate crop, and this object was furthered in disregard of the permanent up-keep of the property. Several plantations might at times be in control of one individual or firm and this led to the transfer and indiscriminate mixture of movable property which should have been localized in particular estates. The negroes, suddenly shifted to a free status and to a system of lax discipline, became unruly and faithless to contract. Offers of higher wages or easier work would readily seduce them from one plantation to another and such a departure of laborers might occasion the loss of a whole crop. Trouble arose also because of the "hands" claiming the right to plant cotton or anything else in their respective patches regardless of the requirements of the overseers. All of these difficulties of management were enhanced by the military authorities who caused constant annoyance by deporting mules without compensation, issuing full rations to idle negroes, and enrolling the "hands" as "contraband troops". It sometimes happened that a plantation might be occupied for months as a camp or a recruiting station, making successful cultivation impossible.

It is clear that this whole system, in its essential features, amounted to temporary confiscation. The government based its claim to the proceeds of "captured" property and the revenue from deserted property during the period of its abandonment, upon the owner's disloyalty. In the measures adopted after the war, however, the hardships caused by confiscation in its various forms were considerably mitigated, and this was especially true of the seizures made under the Captured Property Act. Seizure in these cases did not involve final condemnation, since the statute itself contemplated relief to all "loyal" claimants who would, within two years after the close of the war, prove their right before the Court of Claims. In addition, the executive policy of unconditional pardon and general amnesty adopted after the war, removed finally all distinction between "loyal" and "disloyal" owners, and required the restoration, so far as practicable, of all forfeited property rights.

XI. THE RESTORATION OF PROPERTY

In treating the question of restorations as affecting forfeited property certain incidental methods will be briefly examined, and then the work of the Court of Claims will be somewhat more fully considered.[85] Both during and after the war we find that direct

[85] It will perhaps be in order to give at this point a brief explanation of the effect of pardon upon confiscated property. The first pardon proclamation of President Lincoln, and the first three of President Johnson contained various exceptions and conditions, among which were provisions that confiscated property should not be returned. Finally, however, a proclamation of December 25, 1868, declared an unconditional pardon without the requirement of an oath, and without reservation as to forfeited property rights. So far as the executive policy is concerned, there seems to have been no very definite program touching the effect of pardon upon proceedings and judgments under the Confiscation Acts. Attorney-General Speed's first official utterance on the subject, issued in the form of instructions to district attorneys in May, 1865, directed the discontinuance of confiscation proceedings, but these orders were later revoked, and district attorneys were directed to press cases forward to an early determination. In the order of President Johnson regarding the re-establishment of the authority of the United States in Virginia after the close of the war, we find the following: "The Attorney-General will instruct the proper officials to libel and bring to judgment, confiscation, and sale, property subject to confiscation, and enforce the administration of justice within said state". In accordance with this order, Speed directed District Attorney Chandler to see that the appropriate officials were instructed to perform their duties as the President directed. Letter Books of the Department of Justice, 1865 and 1866; Exec. Order, May 9, 1865, *Offic. Rec.*, third series, V, p. 14. The problem was ultimately disposed of by the Supreme Court in a series of decisions. As regards the first confiscation act the question was decided in 1867 in the case of Armstrong's Foundry, 6 Wallace 766, where the court held that the statute regarded the owner's consent to the hostile use of the property as an offense of which confiscation was the penalty, hence pardon would restore to the claimant that portion of the proceeds which went to the government, no opinion being expressed as to the informer's share. A different and somewhat confusing line of interpretation was followed in the case of the act of 1862, for here the court declared that not even universal amnesty could restore the lost property rights. The court argued that the second confiscation act was passed in exercise of belligerent rights, not for the punishment of treason, hence pardon of the traitor could not relieve him of the forfeiture. It was further maintained that property which had been sold to a purchaser in good faith and for value could not be interfered with, and that the proceeds deposited in the treasury were beyond the reach of judicial action, since Congress alone has power to reappropriate money covered into the treasury. Semmes *v.* U. S., 91 U. S. 27; Knote *v.* U. S., 95 U. S. 149. The judicial interpretation of the two acts is, in fact, somewhat puzzling, and it does not appear that any broad underlying principles were consistently adhered to. In the case of the act of 1861 the whole title in fee was held to be surrendered on the ground that the proceeding was merely against the property, but the pardoned owner was as we have just seen entitled to that share of the proceeds which went to the government. In seizures under the act of 1862 the life interest only was forfeited, thus at least partly recognizing the confiscation as a penalty for a criminal offense, but no recovery could be secured by reason of pardon. Moreover, in the very brief opinion in the case of Armstrong's Foundry nothing is said about the exclusive right of Congress to control the appropriation of money from the treasury, though in the case of Knote *v.* United States, this was made one of the chief grounds for refusing restoration.

methods of release were followed which disregarded, in some measure, the statutory jurisdiction of the Court of Claims over these cases. Quartermasters at times released property secured by military seizure before it had passed to the treasury officials. The Secretary of the Treasury, who was continually beset with appeals concerning erroneous seizures, exercised regularly during the war the judicial function of allowing releases if convinced of the *bona fide* character of the applicants.[56] This policy he continued for some months after the war, until, by an opinion of the Attorney-General, these cases were all referred to the Court of Claims.

Another important agency concerned in the restoration of property was the Bureau of Refugees, Freedmen and Abandoned Lands. This institution was created by Congress, March 3, 1865, to provide protection and support for emancipated negroes, and to it control of confiscated, captured, and abandoned real property was entrusted.[57] Estates which had been administered on a lease system by treasury agents were placed in charge of the bureau as was also property seized for judicial confiscation but not actually condemned, and a miscellaneous class of property in the hands of military authorities at the close of the war. The original intention was that deserted lands should be allotted in small holdings to individual freedmen, and, in South Carolina and Georgia, some land was actually assigned. In general, however, the bureau either used its land for colonies of freedmen, or continued the lease system in order to make its property productive of revenue.

At first the bureau adopted a cautious policy regarding restorations, and declined all applications not supported by proof of past as well as present loyalty. By President Johnson's order in August, 1865, however, the bureau was instructed to return the property of all who were included in the partial amnesty proclamations of that year, or who, if excluded from these proclamations, could show certificates of special pardon. As a result of these instructions, the bureau was compelled to part with the greater portion of the property once under its control, and the plan of allotment to freedmen was defeated because of the uncertainty of tenure applying

[56] The actual adjudication of these claims rested in fact with the local agent; that is, he would send in the papers with his recommendation for the Secretary's action. Report of Sec. McCulloch, *Sen. Ex. Doc.* 40 Cong., 2 sess., no. 22.

[57] *Stat. at Large,* XIII, 507.

to the bureau's holdings. A report of Commissioner Howard shows that the officers of the bureau restored 15,452 acres of land seized under the second confiscation act; 14,652 acres received as abandoned and allotted to freedmen, and 400,000 acres of abandoned property which had never been allotted. Thus the total restorations amounted to 430,104 acres.[88]

[88] After President Johnson's order the rules followed by the bureau in connection with these restorations were that land should not be regarded as confiscated until condemned and sold by a federal court; that property not properly considered abandoned or confiscated should be surrendered to claimants; that property be restored to pardoned "rebels", and that restoration of land under cultivation be conditioned upon the payment by the claimant of an amount sufficient to compensate loyal refugees for their labor in working the lands. For the action of the Freedmen's Bureau regarding property see: General Order, War Dept. no. 110, *Offic. Rec.* third series, V, 51; Reports of Gen'l O. O. Howard, Com'r, *House Ex. Doc.* 39 Cong., 1 sess., no. 11; *House Misc. Doc.* 38 Cong., 1 sess., no. 78; *House Ex. Doc.* 39 Cong., 1 sess., no. 19; *Ibid*, no. 99; Peirce, *The Freedmen's Bureau*, 21, 22, 24.

XII. RESTORATIONS BY THE COURT OF CLAIMS

The incidental methods of restoring property noted in the foregoing section, were all subordinate to the work of the Court of Claims —the regularly designated tribunal for adjudicating cases of captured and abandoned property, and the only agency by which the grounds of release were subjected to a strictly judicial determination. In dealing with these cases the Court of Claims followed, not too rigidly, the terms of the various statutes involved,[89] and introduced certain rules of its own making. The claimant was required to show that he was the owner of the property claimed and that he had never given aid or comfort to the rebellion. The government was not to be loaded with the burden of proving disloyalty. Voluntary residence in an insurrectionary district was taken as *prima facie* evidence of a rebellious character, and this must be rebutted by satisfactory testimony covering the whole period of the war, and showing that no act of sympathy to the Confederate movement had been willingly performed.

The Court of Claims thus became the tribunal for judging the facts as to the conduct of thousands of professed Unionists in the South, and its hearings assumed somewhat the character of a judgment day proceeding, where, after the deeds of all had been laid bare, the faithful were rewarded and the rebellious turned away. The voluminous testimony which the court examined constitutes perahaps the best body of material revealing in detail the conduct of "loyal" Southerners, and for the historian who takes up the study of the Civil War loyalists it will have somewhat the same

[89] The following provision for the reclamation of property was included in the Captured and Abandoned Property Act: "Any person claiming to have been the owner of any such captured or abandoned property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and, on proof to the satisfaction of said Court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, may receive the residue of such proceeds after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale of such property and any other lawful expenses attending the disposition thereof". *Stat. at Large,* XII, 820, Sec. 3. By a further enactment of July 27, 1868, the remedy thus given was declared to be exclusive, precluding the claimant from "suit at common law, or any other mode of redress whatever". *Ibid.* XV, 243, Sec. 3.

value as the papers of the New York royal commission had for the study of the corresponding topic in the Revolutionary War.[90]

Men and women of Union sympathies, as this testimony shows, were scattered in considerable number throughout the South. Surrounded as they were by a repressing and persecuting majority, they naturally found it difficult to express their loyalty in any active, organized form. They had to be content, therefore, with a negative attitude, a sort of "passive resistance", refusing to take any voluntary measures against the government at Washington, and performing individual acts of friendship to the Union cause. We find them resisting the Confederate draft, carrying provisions and medicine to the Union soldiers, contributing funds for helping the "blue-coats", attending the boys in the hospitals, and in other equally mild ways promoting the Union cause.

This "loyalty", which meant simply treason from the standpoint of southern communities and neighborhoods, naturally incurred local persecution, and the Unionist of the South moved constantly in an atmosphere of scorn and prejudice, and was continually disturbed by threats of personal violence. Furthermore, he was often compelled against his will to give some support to the southern cause. It was an exceptional Unionist indeed who was not pressed into the conscript lines, or compelled to subscribe to a Confederate loan, or forced to labor on entrenchments, and in addition to all this he must of course pay taxes into the "rebel" treasury, however loud might be his protest. Children even caught up the national feud, and the refusal of one daring youth to give up the Stars and Stripes for the neighbor boys to spit upon resulted in a severe laceration, and later in a fatal blow from a brick-bat.

In conducting these suits, the Court of Claims found its docket well crowded. The total amount paid out in judgments in such cases up to February 4, 1888, was reported as $9,864,300.75.[91] When we remember that the sums involved in each case were usually small, and that these figures represent only the claims

[90] Testimony of the sort here referred to may be found in the following published reports of cases: *Ct. of Cls. Repts*: III, 19, 177, 218, 240, 390; IV, 337; V, 412, 586, 706.

[91] Treas. Dept. Circular, Jan. 9, 1900, no. 4. For a list of judgments rendered by the Court of Claims between March, 1863, and March, 1867, see: *House Misc. Doc.* 40 Cong., 1 sess., no. 500, pp. 2-9.

which were allowed, we can form an idea of the vast amount of this litigation which the court handled.

The most critical point of law touching these claims related to the effect of pardon and amnesty action of the President upon the rights of claimants for property seized during the war. Were disloyal owners permanently divested of their property by that proviso of the Captured Property Act which required proof that the owner had "never given any aid or comfort to the present rebellion", or could the consequences of disloyalty be avoided by the President's proclamation of pardon and amnesty, and the owner's acceptance of the oath of allegiance? This question was presented in the case of United States *v.* Klein, appealed from the Court of Claims to the Supreme Court.[92] The most liberal view of the case was sustained by the latter tribunal. In main substance the opinion was that Congress had intended to restore property not only to loyal owners, but to those who had been hostile and might later become loyal; that after the proclamation of general amnesty the restoration of property to all *bona fide* owners claiming under the Captured Property Act became the duty of the government, and that such restoration became the "absolute right of the persons pardoned", the government having constituted itself the trustee, not only for claimants protected by the original act, but for all who might later be recognized as entitled to their property. " 'Pardon and restoration of political rights' ", declared the court, "were in return for the oath and its fulfillment. To refuse it would be a breach of faith not less cruel and astounding than to abandon the freed people whom the executive had promised to maintain in their freedom".

After this decision of the Supreme Court, therefore, all claimants who had been dispossessed through the operation of the Captured Property Act were, regardless of loyalty, entitled to restoration. There was, however, another proviso in the original act which more seriously affected the claimants' prospects of recovery. The suits must, according to the law, be brought within two years "after the suppression of the rebellion". The claim, for instance, in the case of United States *v.* Anderson was preferred June 5, 1868.[93]

[92] 13 Wallace 168. The decision in U. S. *v.* Padelford, 9 Wallace, 531, is similar.

[93] 9 Wallace 56.

Could this be construed as having been presented within the prescribed limit? Here the court was called upon to fix the exact date when, in the strict legal sense, the rebellion ceased. Again a liberal construction was adopted. The court held that Congress could not be supposed to have left possible claimants to decide this matter for themselves, and that, in lieu of a formal treaty of peace which in the case of a foreign war serves to mark the exact point at which the legal relations peculiar to war cease, there must be some public act or legislation which will serve to fix definitely such a point. The date of President Johnson's proclamation, August 20, 1866, in which for the first time the entire suppression of the rebellion throughout the country was declared, was taken by the court as marking the legal termination of the war. It was pointed out that on March 2, 1867, Congress, referring to an act of June 20, 1864, regarding the pay of non-commissioned officers and privates, had continued the act in force for three years "from and after the close of the rebellion, as announced by the proclamation of the President, August 20, 1866". This date had therefore been declared by the executive and legislative departments to be the termination of the rebellion, and the court declared that it must therefore be so applied with reference to the rights intended to be secured by the Captured Property Act.

Unfortunately for the claimants, the decision in the Klein case did not come until 1869, after the period had expired during which, according to the declaration of the Supreme Court in the Anderson case, the recovery of property was possible. It thus appeared that there were many claimants to whom, as a matter of equity, Congress owed relief, while at the same time it was alleged that a considerable sum, variously reported but supposed to be well over ten million dollars, remained as a part of the captured property or cotton "fund" after the necessary deductions were made. For this reason agitation was begun to secure relief for those claimants who, under the very natural misapprehension that they would be required to prove loyalty, had allowed the two years' limitation to lapse without taking advantage of their right to plead before the Court of Claims. Various bills to revive in favor of such claimants the right of action before the Court of Claims have been presented to Congress, and the House Committee on Judiciary has at

various times reported favorably on such legislation, but no action has yet been taken.[94] Meanwhile curious suggestions have been made regarding the disposition of this "fund", such as dividing it among the states or devoting it to the relief of ex-Confederate soldiers, but these proposals, like the proposed bills and committee reports, have been lost in the general oblivion of the Congressional calendar.

In general the various reports and proposals presented on this complicated subject are inconsistent. The number of claimants whose right of action was debarred has doubtless been greatly exaggerated, while a careful analysis shows that the figures and assertions regarding the so-called "fund" in the treasury are misleading. In the report of the House Committee on Judiciary, submitted to the first session of the fifty-second Congress, we find a statistical exhibit which shows $31,722,466.20 as the "whole amount of the sales from captured and abandoned property", and after the deduction of such items as cost of collecting, amounts transferred or released, or amounts paid out of the "fund" on judgments or special acts of release, a balance of $10,512,007.96 is shown as the amount remaining from the captured property "fund".[95]

By reference, however, to the report of the Register of the Treasury, February 4, 1888, it appears that the *net* receipts from captured and abandoned property were $26,887,584.39. Not all of this, however, was secured from the sale of privately owned cotton.[96] A sum exceeding six million dollars included under this heading was derived from the *purchase* of cotton by the treasury officials, the cotton later being sold for gold, thus involving a double profit owing to the premium on gold. Receipts from miscellaneous property, rents, and from the sale of captured vessels were also classed in this same fund. A deduction of these various items leaves $15,880,664.19, as the receipts from the sale of individual cotton.

One very important item in this last total, however, was a sum amounting to $4,886,671 received from the sale of cotton captured after June 30, 1865, nearly all of which was Confederate,

[94] *Cong. Globe,* 52 Cong., 1 sess., House Bills 173, 455, 2764, 5451; *Ibid.* vol. 29, House Bill 7618; *House Reports,* 50 Cong., 1 sess., no. 646, serial 2600; *Ibid,* 51 Cong., 1 sess., no. 784, serial 2809; *Ibid,* 52 Cong., 1 sess., no. 1377.

[95] *House Report,* 52 Cong., 1 sess., no. 1377.

[96] Treas. Dept. Circular, Jan. 9, 1900, no. 4.

not private, cotton. To understand the nature of this item it must be explained that seizures under the Captured and Abandoned Property Act did not cease at the close of war. Besides the collection of private property the treasury officials had been constantly active in seizing the property of the Confederate government.[97] Much of this property was in the hands of private holders scattered through the insurrectionary states, and the treasury agents continued their collections of this sort of property during 1865. After the spring of 1865 the seizures of the Treasury Department were chiefly confined to property which had been sold to the Confederate government, or to one of the Confederate states, or subscribed to the "produce loan" of the Confederacy, or delivered as military supplies to the Confederate army.

In collecting this property of the Confederate government, much difficulty was experienced in avoiding the seizure of purely private property. Agents would often take cotton held in private possession on suspicion that it belonged to the Confederate States. If mistakes were discovered, the property was usually released to the owner at once without requiring proofs of loyalty. Sometimes rather loose methods were used in the collection of "C. S. cotton" after the war. Mr. X would come to the agent and say, "I know where some C. S. cotton is", and the agent would engage to give him a portion if he would bring it in. X would then get any cotton he could lay his hands on and deliver it over to the agent.[98] In this and similar ways, there was indiscriminate seizure of private property with that which had belonged to the Confederacy, but on the whole considerable caution seems to have been exercised by the Treasury Department.[99] To aid them in avoiding erroneous seizure of private cotton, agents had access to lists which had been kept by "rebel" cotton agents, showing where and in whose possession

[97] *House Ex. Doc.* 39 Cong., 2 sess., no. 97.

[98] In some instances of this sort as high as 75 per cent. of the proceeds was to be paid to the person undertaking the risk of collecting the cotton. The records of B. F. Flanders, Supervising Special Agent of the Treasury Department at New Orleans contains numerous such instances. These records are filed with the Miscellaneous Division of the Treasury Department.

[99] In Secretary McCulloch's printed circular of instructions, Oct. 20, 1865, agents were warned to use great care in collecting property belonging to the Confederate government, or subscribed to the produce loan, "to the end that the rights of individuals be not interfered with, or the property of unoffending persons taken from them".

C. S. A. cotton was to be found. Another valuable source of evidence was to be had in the county tax lists from which all public (Confederate) cotton was excluded as not subject to taxation, and on which none but private cotton was entered.[100]

If now we recur to the above-mentioned fifteen millions actually received from individual cotton, and deduct the various disbursements which must be charged against this sum, such as expenses, amounts allowed by the Secretary of the Treasury on claims, amounts paid on judgments of the Court of Claims, or allowed by private acts of Congress, there remains a balance of $4,992,349.92.[101] This amount, it will be noticed, is substantially equal to the proceeds of the sale of cotton which belonged to the Confederacy. Hence it is maintained by the Treasury Department that no such "fund" as that mentioned in the House Committee's report exists, and that the balance now in the treasury represents not the value of cotton due to individuals whose claims have been debarred, but the amount received from Confederate cotton which the United States is under no just or equitable obligation to return.

These war claims are still being constantly urged. When presented directly to the Court of Claims they are declared outlawed by the two-year limitation. If they appear in the form of private petitions to Congress for equitable relief, they are ultimately referred to the Treasury Department for recommendation, and the department maintains a set of clerks whose whole time is given to examining the genuineness of such claims. In this rather unsatisfactory shape the question rests today, with an exaggerated impression abroad as to the number of owners dispossessed, and with a misapprehension, even on the part of Congressmen, as to the existence of a "fund" for their relief.

[100] Affidavit of Wm. A. McCann, Dec. 12, 1865, *Cotton and Captured Property Record* no. 4027. Files of the Treas. Dept.

[101] Treas. Dept. Circular, Jan. 9, 1900, no. 4.

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UNPUBLISHED MATERIAL

For the subject of confiscation and captured property the unpublished material, though voluminous, is for the most part difficult of access, and unsuitably arranged for purposes of historical investigation. The records of the various district courts of the United States form an important and authentic source of information, and are usually well preserved, except where some accident has caused their destruction, as in the case of the Chicago fire of 1871. The entries, however, in the docket books, where a convenient chronological arrangement is preserved, are not always definite enough to distinguish sharply the various kinds of seizure, and a more laborious examination of the court files becomes necessary. Among these papers are contained the original records of every proceeding connected with the trial: the libel, the plaintiff's answer, a copy of the monition, the various depositions and affidavits, the writ of "vendi", the marshal's return of sale, the certificate of the court's final process with the written opinion, perhaps, of the judge, and whatever petitions for appeal or restoration may have been submitted after the condemnation of the property.

The records of the Attorney-General's office for the period of the Civil War are disappointing. No systematic series of reports was kept which would afford a comprehensive notion of the extent of the enforcement of the Confiscation Acts throughout the country. Communication between this office and the various district attorneys and marshals was incidental and casual rather than regular, while the more important portions of the correspondence with the other executive departments have been published in the series of congressional documents. The material, moreover, is loosely arranged and poorly housed, and much of it (*e. g.*, the letters received), is entirely without index. There is enough here, however, to reveal the problems encountered in the enforcement of the acts, the methods of evasion and interference resorted to, and the nature of the instructions, usually not very satisfactory, which were sent out from Washington.

The voluminous records touching "captured and abandoned property" are deposited in the office of the Miscellaneous Division of the Treasury Department. This varied mass of material occupies

several scores of cubic feet, and contains letter books and reports of treasury agents, papers collected in the adjudication of "cotton claims", plantation records, reports of inspectors, etc. In this office there is also deposited a considerable mass of Confederate records touching the sequestration of property, the "cotton loan", and the various transactions of the Confederate treasury. Some of these records were captured, and some were purchased. A large part of this material has been recently indexed by the card system, and is still being constantly used for securing data relating to various kinds of "war claims". Like much of the government's records, however, it is poorly housed and almost inaccessible for purposes of historical investigation. For an effective use of the material found in the Treasury Department a considerable amount of discrimination is necessary. Even in the case of treasury warrants, which are presumably the most accurate and definite of documents, it is in some cases necessary to "go behind the face of the return", for instances are not wanting in which these warrants have stated incorrectly the source from which money has been derived.

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